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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977.

No. ~~77~~-941

JOEL D. ENDER,

Petitioner,

vs.

CHRYSLER CORPORATION, UNITED AUTO WORKERS LOCAL 1268, AND INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Petitioner, Joel D. Ender, prays the Supreme Court to grant a writ of certiorari to review the summary judgment on the pleadings granted to the Respondents by the Court below.

Because of the number of independent questions being appealed herein, a short introduction may be essential to a ready and adequate understanding of the legal contours of this case. The complaint asserted claims by the Petitioner-employee against the employer and union Respondents under The Labor-Management Relations Act of 1947, hereinafter "LMRA", and under The Labor-Management Reporting and Disclosure Act of 1959, hereinafter "LMRDA."

To begin with, under LMRA, the complaint asserted what might be described as the "typical triad" of claims for wrongful acts *in the administration* of a collective bargaining contract:

1. Employer breach of employee's bargaining contract rights;
2. Unfair representation by local union in handling employee's grievance;
3. Conspiracy by employer and local union in the above wrongs.

The above three claims for wrongful acts in the administration of a bargaining contract have all survived motions for summary judgment for failure to state a claim. The Courts below concede that the above three claims raise issues of material fact. The Court of Appeals held that Petitioner may proceed with his civil action against his employer because no remedy against the employer is available through further resort to bargaining contract or intra-union appeal procedures. Although it conceded the sufficiency of the above claims against the local union, on the sole ground that Petitioner had failed to exhaust intra-union procedures, the Court of Appeals granted a summary judgment to the union on claims 2 and 3 above. The Court thereby required Petitioner to pursue joint claims against his employer and local union in multiple forums. Petitioner herein submits that this multiple forum requirement is in conflict with the Supreme Court rule establishing an employee's right to join both employer and union in a single civil action.

In addition to the above three claims for wrongful acts in the administration of a collective bargaining contract, the complaint asserted several claims for wrongful acts *in the very negotiation and perpetuation* of certain provisions in the grievance procedure of the bargaining contract, and in the intra-union appeal procedure of the union constitution.

That is, as violations of LMRDA Sec. 411(a)(4) and the LMRA duty of fair representation, the complaint asserted that by means of certain provisions in the bargaining contract and in the union constitution, the Respondent unions illegally (a) limited Petitioner's right to sue his employer by explicitly prohibiting such lawsuits, (b) limited Petitioner's right to sue the unions by explicitly prohibiting such lawsuits, (c) required Petitioner to exhaust intra-union procedures inherently unreasonable, futile and inadequate in respect to any claim against the bargaining contract itself, or against the union constitution itself, or against the employer and the union jointly, and (d) required the exhaustion of union procedures for an unlimited period of time exceeding four months.

As violations of LMRDA Sec. 415 and the LMRA duty of fair representation, the complaint asserted that the unions wrongfully failed to inform the Petitioner of the provisions of the LMRDA Bill of Rights, and instead made statements in the bargaining contract and in the union constitution in total opposition to the Bill of Rights provisions.

The complaint alleged employer conspiracy with the unions in the aforesaid LMRDA and LMRA violations in the very structure and language of the bargaining contract and union constitution. The employer reaped the benefit of the illegal limitation on employee lawsuits against the employer.

Finally, the complaint asserted that all such claims against the bargaining contract itself, and against the union constitution itself, and against the employer jointly with the union could not possibly be remedied or even heard through resort to intra-union or bargaining contract procedures, because consideration of such claims is either explicitly prohibited by provisions in said contract and constitution, or is practically impossible within the maximum four month period allowed by LMRDA Sec. 411(a)(4).

None of the above claims for wrongful acts in the very negotiation and perpetuation of certain provisions in the bargaining

contract and in the union constitution have survived the motions for summary judgment for failure to state a claim. The District Court held that these particular claims did not raise any issues of material fact. The Court of Appeals affirmed this aspect of the District Court opinion, and adopted it verbatim.

Therefore, Petitioner asks the Supreme Court to review the substantive merits of these particular claims in light of the traditional standards for judging the sufficiency of pleadings. Petitioner submits herein that the rejection of these particular claims by the Courts below creates a conflict with Supreme Court decisions on similar matters of substantive labor law, and on pleading requirements in general. Petitioner also submits that in rejecting these claims on their merits, thereby perpetuating contract provisions which wrongfully prohibit all lawsuits, the Courts below are sanctioning a gross fraud on Petitioner and all other UAW members. Sanctioning fraud so far departs from the accepted course of judicial proceedings that the Supreme Court should exercise its power of supervision.

OPINIONS BELOW.

None of the opinions below were published in the official reports. In the District Court for the Northern District of Illinois, Western Division, the docket number of the case was 73 C 23 W. D. In the Seventh Circuit Court of Appeals, the docket number of the case was 76-2232. The Appendix to this Petition includes the pertinent opinions: (A) the District Court opinion, (B) the initial order of the Court of Appeals, (C) the order of the Court of Appeals upon rehearing, and (D) the order of the Court of Appeals denying a rehearing en banc.

JURISDICTION.

This Petition is filed within ninety days of October 11, 1977, which is the date of the decision of the Court of Appeals upon rehearing. The initial decision of the Court of Appeals was entered on June 9, 1977. This Court's jurisdiction is invoked

under 28 U. S. C. Sec. 1254(1) and Supreme Court Rule 19(1)(b). The Court of Appeals stayed its mandate up to and including Dec. 30, 1977.

QUESTIONS PRESENTED.

The first five of the following seven questions involve independent causes of action, and therefore do not of necessity all stand or fall together.

Question I

Regarding an Employee's Right to a Single Civil Action on Joint Claims Against His Employer and Union for Wrongful Acts in the Administration of a Bargaining Contract.

(a) Where it is conceded that an employee's complaint has sufficiently pleaded the typical triad of claims under LMRA for employer breach of employee's bargaining contract rights, local union unfair representation in handling the grievance over said breach, and conspiracy in the above,

(b) and where it is conceded that a civil action against the employer is necessary and proper because the union's unfair representation in combination with admitted contractual limitations has precluded any remedy against the employer through further resort to either bargaining contract or intra-union procedures,

(c) and where it is assumed, arguendo, that the intra-union procedures are legal on their face,

(d) and where it is conceded that even in a civil trial against the employer alone for breach of contract, the employee is required by law to prove simultaneously the unfair representation claim against the local union,

(e) and where it is conceded that in an intra-union proceeding against the union alone for unfair representation in handling the grievance, the employee is required to prove simultaneously the breach of contract claim against the employer,

(f) the first question herein propounded to the Supreme Court is: shall an employee be required to pursue joint claims against his employer and local union in the multiple forums of court and intra-union procedures, or shall he be allowed to proceed against both in a single civil action? Did the Court below properly hold that Petitioner could not join the union in a single civil action with the employer?

Question II

Regarding Violations of LMRA Duty of Fair Representation in the Very Negotiation and Perpetuation of Section 38 of the Bargaining Contract.

(a) Where it is conceded as a matter of established law that an employee such as Petitioner may prosecute a civil action against his employer for breach of the employee's bargaining contract rights in every instance where the employee has sufficiently pleaded a claim of unfair representation against his local union for its wrongful handling of his grievance, and where the employee has also demonstrated that no remedy against the employer is available through further resort to either the bargaining contract or intra-union procedures,

(b) and where it is conceded that Section 38 of the bargaining contract states that only the union shall have the right to bring a civil action against the employer for any breach of the bargaining contract, and that no employee shall have any right to sue the employer for breach of contract even if the employee claims unfair representation by the union in handling a grievance over employer's breach,

(c) the second question herein propounded to the Supreme Court is: did the Court below properly hold that no issue of material fact was raised by a claim that Section 38 of the bargaining contract on its face fraudulently misleads Petitioner and all other employees as to their established legal right to bring a civil action against the employer for breach of the bargaining

contract in every instance where union unfair representations has precluded any other remedy against the employer through resort to bargaining contract or intra-union procedures?

Did the Court below properly conclude that a claim under LMRA against the international and local unions for unfair representation in the very negotiation and perpetuation of Section 38 does not lie even where the unions are co-authors of Section 38, and where Section 38 on its face is inherently misleading regarding an employee's right to sue his employer for breach of the bargaining contract?

Isn't the Court below sanctioning a fraud on Petitioner and all other employees by allowing Section 38 to stand, since it is inherently misleading and is presented to the employees under the auspices of their union, their statutory representative upon whom they are both required and entitled to rely to protect their legal rights?

Question III

Regarding Violations of LMRDA Secs. 411(a)(4) and 415 in the Very Negotiation and Perpetuation of Section 38 of the Bargaining Contract.

(a) Where it is recognized that LMRDA Sec. 411(a)(4) states that a union shall not limit a member's right to institute an action in any court, irrespective of whether the union is named as a defendant,

(b) and where it is recognized that LMRDA Sec. 415 states that a union shall inform its members of the aforesaid provisions of Sec. 411(a)(4),

(c) and where it is conceded that Section 38 of the bargaining contract states that only the union shall have the right to bring a civil action against the employer for any breach of the bargaining contract, and that no employee shall have any right to sue the employer for breach of contract even if the

employee claims unfair representation by the union in handling a grievance over employer's breach,

(d) the third question herein propounded to the Supreme Court is: did the Court below properly hold that no issue of material fact was raised by a claim under LMRDA Sec. 411 (a)(4) that Section 38 of the bargaining contract, by absolutely prohibiting employee lawsuits against the employer, wrongfully limited Petitioner's established legal right to sue the employer for breach of the bargaining contract in every instance where union unfair representation has precluded any other remedy against the employer through further resort to either bargaining contract or intra-union procedures?

Did the Court below properly hold that no issue of material fact was raised by a claim under LMRDA Sec. 415 that in presenting Section 38 of the bargaining contract to the individual employees as a statement of their legal rights, the unions were necessarily failing to inform their members of the provisions of LMRDA Sec. 411(a)(4) to the effect that the unions could not limit a member's individual right to sue an employer, since Section 38 on its face states that union members are absolutely prohibited from suing the employer for breach of contract?

Did the Court below properly hold that Petitioner's complaint failed to state legally sufficient claims under LMRDA Secs. 411(a)(4) and 415 against the international and local unions in respect to their acts of negotiating and perpetuating Section 38, where Section 38 on its face absolutely limits a member's right to sue his employer, and where Section 38 is presented to the employees under the auspices of their unions, their statutory representatives upon whom they are both required and entitled to rely to protect their legal rights?

Isn't the Court below sanctioning a fraud on Petitioner and all other employees by allowing Section 38 to stand?

Question IV

Regarding Violations of LMRDA Secs. 411(a)(4) and 415 in the Very Imposition and Perpetuation of Article 33, Section 13 of the Union Constitution.

(a) Where it is recognized that LMRDA Sec. 411(a)(4) states that a union shall not limit a member's right to institute an action in any court irrespective of whether the union is named as a defendant, and further states that a union may not require a member to exhaust unreasonable intra-union procedures, and further states that the exhaustion of union procedures may not be required for any period exceeding four months,

(b) and where it is recognized that LMRDA Sec. 411(b) states that any intra-union procedural provision in conflict with aforesaid provisions of Sec. 411(a)(4) shall be void,

(c) and where it is recognized that LMRDA Sec. 415 states that a union shall inform its members of the aforesaid provisions of Secs. 411(a)(4) and 411(b),

(d) and where it is conceded that Article 33, Section 13 of the intra-union appeal procedures in the UAW constitution states that a union member with any type of complaint involving the union must completely exhaust the three steps of the intra-union appeal procedure before appealing to any civil court for redress, and where it is also conceded that neither Article 33, Section 13 nor any other union provision makes any exception to this absolute exhaustion requirement for complaints by a member against the union constitution itself, or against the bargaining contract itself, or against the employer and the union jointly,

(e) and where it is conceded that a member's claims against the union constitution itself (such as Petitioner's claim against Article 33, Section 13) can be heard and decided only by the Constitutional Convention by reason of its constitutional Article 3, and where it is also conceded that the Convention meets only every two years, and therefore cannot possibly decide a claim

against the constitution itself within the four month period allowed by LMRDA Sec. 411(a)(4),

(f) and where it is conceded that a member's claims against the bargaining contract itself (such as Petitioner's claim against Section 38), cannot be heard or decided through intra-union procedures within any period of time because intra-union authorities at all three steps are explicitly prohibited from either hearing or deciding any such claims against the bargaining contract by the following provisions of the union constitution: Article 19, Section 1 prohibits the local union, the International Executive Board and the Constitutional Convention (Steps 1, 2 and 3) from voiding or in any way controverting the bargaining contract; Article 33, Section 12 prohibits the Public Review Board (Step 3 alternate) from so treating with the constitution,

(g) and where it is conceded that a member's claims against the employer jointly with the union (such as Petitioner's typical triad of claims under LMRA for wrongful acts in the administration of the bargaining contract) cannot be heard or decided through intra-union procedures within any period of time because the employer is not in any way subject to the jurisdiction or power of the intra-union authorities, and no decision binding on the employer can be rendered,

(h) the fourth question herein propounded to the Supreme Court is: did the Court below properly hold that no issue of material fact was raised by a claim that constitutional Article 33, Section 13, with its unlimited intra-union exhaustion requirement admitting of no exceptions, violates LMRDA Sec. 411(a)(4) in three ways: (1) by requiring exhaustion of intra-union procedures that are inherently unreasonable, futile and inadequate in respect to any member claim against the union constitution itself, or against the bargaining contract itself, or against the employer and union jointly; (2) by requiring exhaustion of intra-union procedures for an unlimited period exceeding four months; and (3) by limiting Petitioner's right

to sue both the employer and the unions prior to exhaustion of inherently unreasonable and futile intra-union procedures?

Did the Court below properly hold that no issue of material fact was raised by claim that Article 33, Section 13, with its unlimited intra-union exhaustion requirement admitting of no exceptions, was void under LMRDA Sec. 411(b) because Section 13 necessarily conflicts with the standards for union procedures mandated by LMRDA Sec. 411(a)(4)?

Did the Court below properly hold that no issue of material fact was raised by a claim under LMRDA Sec. 415 that in presenting Article 33, Section 13 to the individual union members as a statement of their legal rights, the unions were necessarily failing to inform the members of the provisions of LMRDA Sec. 411(a)(4) to the effect that a union cannot require exhaustion for a period exceeding four months, cannot require exhaustion of unreasonable or futile procedures, and cannot limit a member's right to sue the unions and the employer, since Article 33, Section 13 on its face controverts those statutory provisions?

Did the Court below properly hold that Petitioner's complaint failed to state legally sufficient claims under LMRDA Secs. 411(a)(4), 411(b) and 415 against the international and local unions in respect to their acts of imposing and perpetuating Article 33, Section 13?

Isn't the Court below sanctioning a fraud on Petitioner and all other UAW members by allowing Article 33, Section 13 to stand?

Question V

Regarding Violations of LMRDA Sec. 415 Duty of Unions to Inform Members of the Provisions of the LMRDA Bill of Rights.

(a) Where it is recognized that LMRDA Sec. 415 states that a union shall inform its members of all the provisions of the LMRDA Bill of Rights, 29 U. S. C. Secs. 411-415,

(b) and where it is conceded that Petitioner swore under oath in a verified complaint that the international and local unions failed to inform him of the provisions of the LMRDA Bill of Rights, and in particular failed to inform him of the provisions of LMRDA Sec. 411(a)(4) to the effect that the unions could not limit his right to sue the unions or any other party, could not require him to exhaust unreasonable intra-union procedures, and could not require him to exhaust any union procedures for a period exceeding four months; that in particular the unions also failed to inform him of the provisions of Sec. 411(b) to the effect that any intra-union procedural provision inconsistent with the standards of Sec. 411(a)(4) was void; that in particular the unions also failed to inform him of the provisions of LMRDA Sec. 412 to the effect that any union member whose rights under Secs. 411(a)(4) and 411(b) were infringed by the union could bring a civil action in federal court,

(c) and where it is conceded that the foregoing fact allegations made under oath by Petitioner were unrebutted by the Respondent unions with statements under oath or by other evidence,

(d) the fifth question herein propounded to the Supreme Court is: did the Court below properly hold that no issue of material fact was raised by a claim that the international and local unions had violated their LMRDA Sec. 415 duty to inform the Petitioner of the provisions of Secs. 411(a)(4), 411(b) and of the other LMRDA Bill of Rights provisions?

Question VI

Regarding Conspiracy by the Employer and the International and Local Unions in the Above LMRA and LMRDA Violations in the Bargaining Contract and in the Union Constitution.

(a) Where it is conceded that the employer and the international and local unions have together negotiated and perpetu-

ated Section 38 of the bargaining contract, which section prohibits all employee lawsuits against the employer for breach of the bargaining contract,

(b) and where it is conceded that the employer has joined with the unions in this lawsuit and in other officially reported lawsuits in asserting that Article 33, Section 13 of the union constitution prohibits all employee lawsuits against the employer as well as the unions prior to complete exhaustion of intra-union procedures,

(c) the sixth question herein propounded to the Supreme Court is: did the Court below properly hold that no issue of material fact was raised by a claim that the employer and the international and local unions conspired together by means of Section 38 and Article 33, Section 13 for the purpose of illegally prohibiting employee lawsuits against themselves? If the Supreme Court in its response to Questions II-V above rules in favor of the Petitioner on any of his claims against the bargaining contract and constitution, does it not automatically follow that this conspiracy claim is legally sufficient under the traditional standards for judging the sufficiency of pleadings?

Question VII

Regarding the Inherent Futility of an Intra-Union Appeal of Any Claim Against the Union Constitution Itself, or Against the Bargaining Contract Itself, or Against the Employer Jointly with the Union.

(a) Where the Court of Appeals in its initial decision on this appeal on June 9, 1977 adopted in toto the District Court opinion which held that no issue of material fact was raised by any of the above claims under LMRA and LMRDA against Section 38 of the bargaining contract and against Article 33, Section 13 of the union constitution, and where the Court of Appeals therefore affirmed a summary judgment on grounds that Petitioner's complaint had failed to state a claim on these matters,

(b) but where the Court of Appeals on October 11, 1977 in its decision upon rehearing appears to have added the obiter dictum that Petitioner must exhaust an intra-union appeal of these particular claims if they do state sufficient claims,

(c) the seventh question herein propounded to the Supreme Court is: did the Court of Appeals in its Rehearing Order properly hold in the alternative that intra-union exhaustion was a prerequisite to a civil action on the LMRA and LMRDA claims against the contract and the constitution and against the employer and union jointly were Petitioner has demonstrated in Question IV above that an intra-union appeal of such claims is inherently unreasonable and futile since specified provisions in the union constitution clearly preclude any intra-union hearing or decision on such claims?

STATUTORY PROVISIONS INVOLVED.

The Labor-Management Reporting and Disclosure Act of 1959, Title 29, United States Code:

Sec. 411(a)(4):

> Protection of the right to sue.—No labor organization shall limit the right of any member thereof to institute an action in any court, or in a proceeding before any administrative agency, irrespective of whether or not the labor organization or its officers are named as defendants or respondents in such action or proceeding, or the right of any member of a labor organization to appear as a witness in any judicial, administrative, or legislative proceeding, or to petition any legislature or to communicate with any legislator: Provided, That any such member may be required to exhaust reasonable hearing procedures (but not to exceed a four-month lapse of time) within such organization, before instituting legal or administrative proceedings against such organizations or any officer thereof:

Sec. 411(b):

> Any provision of the constitution and bylaws of any labor organization which is inconsistent with the provisions of this section shall be of no force or effect.

Sec. 415:

Information to members of provisions of chapter.—Every labor organization shall inform its members concerning the provisions of this chapter.

Sec. 412:

Civil action for infringement of rights; jurisdiction.—Any person whose rights secured by the provisions of this subchapter have been infringed by any violation of this subchapter may bring a civil action in a district court of the United States for such relief (including injunctions) as may be appropriate. Any such action against a labor organization shall be brought in the district court of the United States for the district where the alleged violation occurred, or where the principal office of such labor organization is located.

The Labor-Management Relations Act, 1947 (as amended).

Title 29, United States Code:

Sec. 185(a):

Suits by and Against Labor Organizations.

Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

STATEMENT OF THE CASE.

A. Federal Question Jurisdiction.

Federal question jurisdiction over all claims was invoked in the District Court (a) under 29 U. S. C. Sec. 185 in regard to the breach of bargaining contract claims against the employer, (b) under 28 U. S. C. Sec. 1337 in regard to the LMRA unfair representation claims against the unions, (c) under 29 U. S. C. Sec. 412 in regard to the LMRDA Bill of Rights claims against

the unions, and (d) under 28 U. S. C. Sec. 1337 and the principles of pendent jurisdiction in regard to claims of employer conspiracy in the unions' LMRA and LMRDA violations.

B. Nature of the Case.

The complaint asserted claims by Petitioner-employee against the employer and union Respondents under The Labor-Management Relations Act of 1947 ("LMRA"), and under The Labor-Management Reporting and Disclosures Act of 1959 ("LMRDA").

Petitioner herein appeals the summary judgment on the pleadings granted to the Respondents by the Courts below on most of the claims asserted.

In brief outline, the complaint alleged:

1. Employer breach of some bargaining contract provisions,
2. Union unfair representation in handling grievance for breach,
3. Conspiracy as to claims 1 and 2,
4. Union unfair representation in negotiating Section 38 of the bargaining contract,
5. Union LMRDA violations in negotiating Section 38 of the bargaining contract,
6. Union LMRDA violations in imposing Article 33, Section 13 of the union constitution,
7. Union violation of LMRDA Sec. 415 duty to inform,
8. Conspiracy by employer in claims 4-7,
9. Inherent futility of intra-union appeal of above claims.

Claims 1-3 allege wrongful acts in the administration of the bargaining contract. Claims 4-9 allege wrongful acts in the very negotiation and perpetuation of some provisions of the bargaining contract and union constitution.

C. Alleged Wrongful Acts in the Administration of a Collective Bargaining Contract.

Petitioner's complaint asserted what might be described as the "typical triad" of claims under LMRA for wrongful acts in the administration of a collective bargaining contract:

1. Employer breach of Petitioner's bargaining contract rights;
2. Unfair representation by the local union in handling Petitioner's grievance over said breach;
3. Conspiracy by employer and local union in the above wrongful acts.

It is conceded that the above three claims for wrongful acts in the administration of a bargaining contract have all survived motions for summary judgment for failure to state a claim. Therefore, as this case comes before the Supreme Court upon an appeal of other matters, the above three claims should be taken as well pleaded and true. Since the particular facts alleged in support of these three claims are not material to a decision on any of the Questions presented for Supreme Court review, Petitioner will not reiterate them.

In its decision upon rehearing, the Court of Appeals held that Petitioner may proceed with his civil action against his employer on these claims because no remedy against the employer is available through further resort to bargaining contract or intra-union procedures.

However, on the sole ground that Petitioner failed to exhaust intra-union procedures, the Court of Appeals granted a summary judgment to the local union on claims 2 and 3 above alleging unfair representation in handling Petitioner's grievance and conspiracy with the employer.

This decision by the Court of Appeals necessarily requires the Petitioner to undergo the burden of prosecuting in multiple forums the admittedly valid joint claims against the employer

and local union for wrongful acts in the administration of a bargaining contract.

Petitioner herein renews the argument he made in both Courts below that this multiple forum requirement is in conflict with the Supreme Court rule establishing an employee's right to join both employer and union in a single civil action where both cannot be joined in a single intra-union proceeding. In Question I, Petitioner submits that the right to a single civil action exists even if it is assumed that intra-union procedures could provide an adequate remedy against the local union alone.

D. Alleged Wrongful Acts in the Very Negotiation and Perpetuation of Section 38 of the Bargaining Contract.

As discussed immediately above, Petitioner's complaint asserted the "typical triad" of LMRA claims for wrongful acts in the administration of a bargaining contract: (1) employer breach of contract, (2) local union unfair representation in handling grievance, and (3) conspiracy in the above. In the process of seeking the necessary civil remedy for the above three claims, Petitioner discovered that the Respondents had attempted to preclude all civil relief by means of Section 38 of the bargaining contract.

Petitioner's complaint therefore asserted separate claims for wrongful acts in the very negotiation and perpetuation of Section 38 of the bargaining contract. As a violation of the LMRA duty of fair representation and of LMRDA Secs. 411(a)(4) and 415, the complaint charged that the Respondents have tried to prevent Petitioner (and all other employees) from bringing "typical triad" LMRA lawsuits by explicitly prohibiting all such lawsuits in Section 38 on the bargaining contract. In its entirety, Section 38 reads as follows:

> "(38) LAWSUITS
>
> Any grievance that either (a) is not processed or (b) is disposed of in accordance with this Grievance Procedure shall be considered settled, and such settlement shall be

final and binding upon the Corporation, the employee or employees involved, the Union and its members.

Except with respect to the right to present an individual grievance as expressly set forth in Section (24)(a), the Union shall, in the redress of alleged violations by the Corporation of this Agreement or any local or other agreement supplementary hereto, be the exclusive representative of employees or groups of employees covered by this Agreement, and *only the Union shall have the right to assert and press against the Corporation in any judicial or adjudicatory proceeding any claim or action asserting a violation of the Agreement.*

No employee or former employee shall have any right of action under this Agreement on the basis of or by reason of any claim that the Union or any Union officer or representative has acted or failed to act relative to presentation, prosecution or settlement of any grievance or other matter as to which the Union or any Union representative has authority or discretion to act or not to act under the terms of this Agreement." (Emphasis added.)

With particular reference to the portions of Section 38 emphasized above, Petitioner's complaint asserted that Section 38 on its face purports to bar absolutely without exception all employee lawsuits against the employer for breach of the bargaining contract. The complaint charged that such an absolute bar on lawsuits fraudulently misrepresents an employee's established legal right to sue the employer in every instance where the union's unfair representation has precluded any remedy against the employer through further resort to bargaining contract or intra-union procedures. The complaint therefore sought a declaratory judgment voiding Section 38, as well as punitive damages for intentionally misrepresenting Petitioner's legal rights, and Petitioner's attorneys fees as well.

Petitioner asserted and it is undisputed that at the time of the alleged wrongful acts, Petitioner had had no education beyond high school, a situation in common with most UAW members.

As Petitioner's claims against Section 38 came before the District Court upon Respondent's motion for summary judgment or dismissal on the pleadings, the question before the Court was whether a reasonable man in Petitioner's circumstances could ever be misled as to his legal right to sue by Section 38. Could the Court hold as a matter of law that a typical employee with a high school education would never be misled as to his right to sue by the Section 38 language:

> ". . . only the Union shall have the right to assert and press against the Corporation in any judicial or adjudicatory proceeding any claim or action asserting a violation of the Agreement.
>
> No employee or former employee shall have any right of action under this Agreement. . . ."?

The District Court held that Petitioner's claim that Section 38 on its face misrepresented an employee's right to sue raised no issue of material fact, and therefore rejected the plea for failure to state a claim. The Court of Appeals has affirmed and adopted this aspect of the District Court opinion.

The Supreme Court will find no specific mention of "Section 38" in the Court opinions included in the Appendix to this Petition. However, the Supreme Court should understand that the Courts below did specifically reject the claims against Section 38 for failure to raise any issue of material fact in several holdings throughout the opinions. The LMRA and LMRDA claims against Section 38 were specifically pleaded and exhaustively argued in the Courts below. It is with reference to that pleading and argument that the District Court holds at A3, A4 of its opinion:

> "The plaintiff, however, attempts to show union intransigence by alleging that the International was 'conspiring' with Chrysler to prevent the resolution of plaintiff's grievance. This allegation is entirely conclusory and no facts are alleged or presented to this court to show that a conspiracy exists between the 'International Union' and the

other defendants in this cause. Therefore, no genuine issue of material facts exists as to union intransigence."

In the above quote, the District Court is referring to Petitioner's allegation that the international union conspired with Chrysler to prevent the resolution of Petitioner's grievance by the very act of negotiating and perpetuating Section 38 of the bargaining contract. Petitioner alleged that Section 38 on its face prevented a resolution of Petitioner's grievance because (a) in its second and third paragraphs it prohibits Petitioner from seeking a civil remedy, and (b) in its first paragraph, Section 38 prohibits the unions from either filing suit themselves, or from reopening the grievance proceeding even if an intra-union appeal establishes unfair representation on the part of the union in settling the grievance. (It should be noted that in its decision upon rehearing, the Court of Appeals agreed with this interpretation of paragraph 1 of Section 38. Because this prevents reinstatement of the grievance by the union, the Court of Appeals allowed Petitioner's civil action against the employer over the grievance.)

For the above reasons, the Supreme Court should understand that the Courts below held that Petitioner's claim against Section 38 raised no issue of material fact. The Court of Appeals affirmed and adopted the above quoted District Court ruling on the sufficiency of the claim against Section 38.

Further proof that the Courts below specifically rejected the claim against Section 38, and further insight into the rationale behind the rejection can be gathered from a question posed by Judge Swygert during the oral argument in the Court of Appeals. Petitioner's undersigned counsel also represented him in the Courts below. When Petitioner's counsel argued that Section 38 on its face limited the Petitioner's right to sue the employer in violation of LMRDA Sec. 411(a)(4), Judge Swygert asked how Petitioner could say that Section 38 had limited his right to sue—the Petitioner was in fact suing, wasn't he?

Obviously, the rationale of the Court of Appeals is that if an employee brings suit in spite of the Respondents' denial of his legal right to sue in Section 38, then the employee is not injured and has no grounds to complain. The Supreme Court may wonder what happens when an employee is, in fact, defrauded by Section 38 and consequently fails to bring suit against the employer, thereby foregoing any remedy against the employer whenever the union has wrongfully settled his grievance. The Court of Appeals obviously would allow this employee to complain of the fraudulent misrepresentation in Section 38, because the injury would be total. Of course, the employee who is actually defrauded of his right to sue by Section 38 would never appear in court to complain.

On the basis of the above rationale, the Court of Appeals held that Petitioner had failed to state a claim against Section 38. It is now up to the Supreme Court to decide if "Catch 22" is merely the title of a novel, or whether it is the law of the United States.

Since the Courts below, after being fully briefed, intentionally granted summary judgment on the grounds that the claims against Section 38 failed to raise any issue of material fact, Petitioner herein submits that it is necessary and proper for the Supreme Court to review the substantive merits of the claim against Section 38 in light of the traditional standards for judging the sufficiency of pleadings (see Questions II and III herein).

That is, did Petitioner raise any issue of material fact as to whether Section 38 of the bargaining contract is in violation of LMRDA Secs. 411(a)(4) and 415, where the respective provisions read as follows?

> "Section 38. LAWSUITS . . . only the union shall have the right to assert and press against the Corporation in any judicial or adjudicatory proceeding any claim or action asserting a violation of this Agreement.
>
> No employee or former employee shall have any right of action under this Agreement. . . ."

> "LMRDA Sec. 411(a)(4): PROTECTION OF THE RIGHT TO SUE. No labor organization shall limit the right of any member thereof to institute an action in any court . . . irrespective of whether or not the labor organization or its officers are named as defendants. . . ."
>
> "LMRDA Sec. 415. INFORMATION TO MEMBERS OF PROVISIONS OF CHAPTER. Every labor organization shall inform its members concerning the provisions of this chapter."

With reference to the above language of Section 38, the Supreme Court is also called upon to decide if there is any issue of material fact as to whether said language on its face misrepresents an employee's right to sue to such a degree that the Respondent unions may have breached their LMRA duty of fair representation in negotiating and perpetuating Section 38.

In deciding whether any issue of material fact is raised by these LMRA and LMRDA claims of misrepresentation of an employee's right to sue, the Supreme Court should be mindful that even the Court of Appeals in its decision upon rehearing agrees that a civil lawsuit provides the only possible remedy against the employer once the union has wrongfully settled an employee's grievance.

E. Alleged Wrongful Acts in the Very Negotiation and Perpetuation of Article 33, Section 13 of the Union Constitution.

Article 33 of the UAW constitution establishes a three-step intra-union appeal structure. Step 1 provides for an appeal to the entire membership of the local union. Step 2 provides for an appeal to the International Executive Board of the International union. Step 3 provides for an appeal to the Constitutional Convention of the international union. A Step 3 alternative provides for an appeal of certain types of complaints to the Public Review Board, a body of non-union members appointed by the international union. Although Article 33 establishes the basic three-

step structure of the UAW intra-union procedure, many other Articles of the constitution operate to delegate or limit the jurisdiction and powers of the various intra-union authorities.

The concluding section of Article 33 is Section 13. In its entirety, Article 33, Section 13 reads as follows:

> "Section 13. It shall be the duty of any member or subordinate body who feels aggrieved by any action, decision, or penalty imposed upon him or it, to exhaust his or its remedy and all appeals therefrom under the laws of this International Union prior to appealing to a civil court or governmental agency for redress."

Petitioner's complaint alleged that Article 33, Section 13 requires a union member to resort to and exhaust intra-union procedures on any type of claim involving the union prior to filing a civil lawsuit. The complaint alleged that neither Article 33, Section 13, nor any other union provision makes any exception to this absolute exhaustion requirement in the event that a member has a claim (1) against the union constitution itself, or (2) against the bargaining contract itself, or (3) against the employer and union jointly. The complaint alleged that because certain Articles of the union constitution absolutely preclude any intra-union remedy for such claims, a resort to intra-union procedures is necessarily futile whenever a member has such claims. Petitioner's complaint asserted all three types of claims.

On the grounds that the intra-union procedures cannot possibly provide relief on such claims, and since Article 33, Section 13 on its face nevertheless prohibits any lawsuit prior to intra-union exhaustion, Petitioner's complaint asserted that Article 33, Section 13 on its face was in violation of LMRDA Secs. 411(a)(4) and 415. That is, Petitioner asserted that Article 33, Section 13 wrongfully (a) limited his right to sue the unions and the employer by prohibiting lawsuits prior to exhaustion even in respect to claims where exhaustion was necessarily futile, (b) required him to exhaust intra-union procedures inherently unreasonable and futile in respect to any claim against the union constitution, the bargaining contract, or the employer

and union jointly, and (c) required the exhaustion of union procedures for an unlimited period in excess of four months.

On the grounds that Article 33, Section 13 fraudulently misrepresented a member's established legal right to bring a civil action without prior resort to intra-union procedures whenever such procedures are inadequate, futile or an undue burden, Petitioner's complaint asserted that the international and local unions also breached their LMRA duty of fair representation in the very act of imposing and perpetuating Section 13.

The complaint sought a declaratory judgment voiding Article 33, Section 13 on the basis of LMRDA Sec. 411(b), as well as attorneys fees and punitive damages for intentionally misrepresenting Petitioner's right to sue the union prior to exhaustion of union procedures.

Immediately following are the particular facts which Petitioner presented in support of his claim that intra-union procedures are inherently futile whenever a member has a claim against (1) the union constitution, (2) the bargaining contract, or (3) the employer and union jointly.

(1) Inherent Futility in Exhaustion of Intra-Union Procedures Whenever a Claim Is Made Against the Union Constitution Itself.

LMRDA Sec. 411(a)(4) states, inter alia, that intra-union exhaustion cannot be required for a period exceeding four months. Petitioner asserted that claims against the union constitution itself cannot possibly be heard or decided by intra-union authorities within four months because certain Articles of the union constitution reserve consideration of claims against the constitution to the Constitutional Convention (Step 3 of the UAW procedures). In particular, constitutional Article 3 states:

> "Article 3. CONSTITUTION. This constitution . . . shall be the supreme law of the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), and can be amended only by a

majority vote of the delegates at succeeding regular Constitutional or Special Conventions."

Since Article 3 reserves the power to amend (or rescind) any constitutional Article to the Constitutional Convention (Step 3), the undisputed corollary is that the local union (Step 1), the International Executive Board (Step 2), and the Public Review Board (alternate Step 3) have no power to amend or rescind any constitutional Article that a member claims is illegal under federal law. In the Courts below, the Respondent unions have never disputed Petitioner's assertion that Article 3 reserves to the Constitutional Convention the sole power and jurisdiction over claims against the constitution itself.

It was also undisputed in the Courts below that the Regular Constitutional Convention meets only every two years, as provided by Article 33, Section 9. It is therefore undisputed that the Regular Constitutional Convention cannot hear claims against the constitution itself within the four month period allowed by LMRDA Sec. 411(a)(4). Petitioner therefore asserted that it is necessarily futile for a member to resort to intra-union procedures on any claim against the constitution prior to filing a civil action under LMRDA Sec. 412 for constitutional violations of LMRDA Secs. 411(a)(4), 411(b) and 415.

On the grounds that intra-union exhaustion was necessarily futile within four months in respect to any claim against the constitution itself, Petitioner's complaint alleged that Article 33, Section 13 on its face was fraudulently misleading and injurious because it absolutely requires intra-union exhaustion without regard to its futility.

The Courts below held that no issue of material fact was raised by the above assertion of the inherent futility of exhaustion on any claim against the union constitution itself. However, the Courts below did not reason their way to this conclusion by actually comparing the language and effect of UAW Article 3 and Article 33, Section 13 with the specific statutory standards prescribed by LMRDA Secs. 411(a)(4),

411(b) and 415. Rather than compare the specific evidence in this case with the specific language of the statutes, the Courts below held that carte blanche legal approval had been conferred on each and every UAW intra-union provision for all time by *Newgent* v. *Modine Mfg. Co.*, 495 F. 2d 919, 927 (7th Cir., 1974). According to the Courts below, in the post-*Newgent* world, any attack upon any UAW intra-union provision under LMRDA Secs. 411(a)(4) and 415 is necessarily "frivolous". (See A3 of District Court opinion, adopted in toto by Court of Appeals.) The Courts therefore held that Petitioner's attack on Article 33, Section 13 raised no issue of material fact (see A2, A4 of District Court opinion, adopted in toto by Court of Appeals).

The Courts below were unmoved by Petitioner's observation that the court in *Newgent* was not faced with and did not specifically rule on any of the particular claims made in this lawsuit. For example, the court in *Newgent* did not decide any claim against Article 33, Section 13, and it did not specifically hold that Article 33, Section 13 complied with LMRDA Secs. 411(a)(4), 411(b) and 415.

Petitioner herein asks the Supreme Court to review the substantive merits of his claim against Article 33, Section 13 in light of the traditional standards for judging the sufficiency of pleadings. Was any issue of material fact raised by his claim that an intra-union appeal is inherently futile on any claim against the union constitution itself? Is Article 33, Section 13 "in conflict with" LMRDA Sec. 411(a)(4) because it requires exhaustion even when exhaustion is necessarily futile? Did the Courts below properly hold that *Newgent* v. *Modine Mfg. Co.* gave carte blanche legal approval for all time to all UAW intra-union provisions including Article 33, Section 13? Or, should the specific language and effect of Article 33, Section 13 be judged against the specific language and mandate of LMRDA Secs. 411(a)(4), 411(b) and 415?

(2) Inherent Futility of Exhaustion of Intra-Union Procedures Whenever a Claim Is Made Against the Bargaining Contract Itself.

Article 33, Section 13[1] on its face requires a union member to resort to and exhaust intra-union procedures before filing suit in respect to any and all claims he may have which involve the union. One type of claim involving the union for which no remedy is available through intra-union procedures regardless of the amount of time expended is a claim against the bargaining contract itself, such as Petitioner's claim against Section 38 (discussed in Part D above, and in Questions II and III).

As the Court may recall, Petitioner seeks a declaratory judgment voiding Section 38 of the bargaining contract because it illegally and fraudulently prohibits all employee lawsuits against the employer for breach of the bargaining contract, even where union unfair representation of a grievance has precluded any other remedy against the employer.

Exhaustion of intra-union procedures on a claim against the bargaining contract itself is necessarily futile because intra-union authorities at all three steps are explicitly prohibited from deciding or even hearing claims against the bargaining contract. The local union (Step 1), the International Executive Board (Step 2), and the Constitutional Convention (Step 3) are all prohibited from deciding claims against the bargaining contract or from declaring any bargaining contract section void by union constitutional Article 19, Section 1. So far as it is material to this lawsuit, Article 19, Section 1 reads as follows:

> "Section 1. . . . No officer, member, representative or agent of the International Union or of any Local Union or of any subordinate body of the International Union shall have the power or authority to counsel, cause, initiate, participate in or ratify any action which constitutes a breach of any contract entered into by a Local Union or by the International Union or a subordinate body thereof."

Although the above quote uses the word "contract" rather than "bargaining contract", it is undisputed that Section 1 and

1. Article 33, Section 13, *supra*, pg. 24.

Article 19 as a whole refer solely and specifically to the bargaining contract between the employer and the unions, and not to contracts in general.

Article 19, Section 1 prohibits any "member" from causing or participating in any action which constitutes breach of the bargaining contract. Obviously, it would be a "breach" of the bargaining contract for an intra-union authority to declare Section 38 of the bargaining contract void. Obviously also, it is nothing other than "members" of the union who function as intra-union authorities at Step 1 (local union), Step 2 (International Executive Board), and Step 3 (Constitutional Convention, whose delegates are all union members).

The Public Review Board (alternate Step 3), although composed of non-union members appointed by the international union, is prohibited from hearing or deciding claims against the bargaining contract itself by union constitutional Article 33, Section 12, which in so far as material to this lawsuit reads as follows:

> "Section 12. . . . the Board or panel shall proceed to dispose of all facets of the appeal; provided that in no event shall the Public Review Board have the jurisdiction to review in any way an official collective bargaining policy of the International Union."

Neither the Courts below nor the Respondents have ever specifically disputed Petitioner's contention that all intra-union authorities are explicitly prohibited from deciding claims against the bargaining contract itself by reason of aforesaid Article 19, Section 1 and Article 33, Section 12. It is also undisputed that the intra-union authorities have no jurisdiction or power over the employer, who is of course a necessary party to any claim against the bargaining contract. This lack of any intra-union jurisdiction over the employer provided the very grounds upon which the Court of Appeals held that Petitioner could proceed with his civil action against the employer on the breach of contract claims (see Part C above).

On the basis of the foregoing evidence, Petitioner's complaint asserted that intra-union exhaustion was necessarily futile on any claim against the bargaining contract itself. Since Article 33, Section 13 on its face requires intra-union exhaustion of all claims without excepting claims against the bargaining contract, Petitioner's complaint alleged that Article 33, Section 13 on its face fraudulently misrepresents a union member's established legal right to sue the union and the employer without first resorting to futile intra-union procedures.

Since this misrepresentation of the right to sue is inherent in the language of Article 33, Section 13, Petitioner's complaint asserted that the unions had breached the LMRA statutory duty of fair representation in the very act of imposing and perpetuating the section.

Petitioner's complaint also asserted that Article 33, Section 13 on its face was in violation of LMRDA Secs. 411(a)(4) because (a) it requires exhaustion of intra-union procedures inherently unreasonable and futile in respect to any claim against the bargaining contract, (b) it requires exhaustion for an unlimited period of time exceeding four months, and (c) it limits Petitioner's right to sue the unions and the employer by prohibiting any lawsuit prior to exhaustion of union procedures inherently unreasonable and futile in respect to any claim against the bargaining contract.

As the Court may recall, LMRDA Sec. 411(a)(4) provides (so far as material):

> "Section 411(a)(4). PROTECTION OF THE RIGHT TO SUE. No labor organization shall limit the right of any member thereof to institute an action in any court . . . irrespective of whether or not the labor organization or its officers are named as defendants . . .: Provided, that any such member may be required to exhaust reasonable hearing procedures (but not to exceed a four-month lapse of time) within such organization, before instituting legal or administrative proceedings against such organizations or any officer thereof."

Petitioner's contention under Sec. 411(a)(4) is that while the basic three-step appeal structure of Article 33 may be "reasonable" in its capacity to handle some claims, the whole structure becomes "unreasonable" when Section 13 is appended to the rest of the Article. That is, Section 13 forces a union member to resort to the intra-union procedure on all claims involving the union, even if the procedure is inherently incapable of handling some types of claims, such as claims against the bargaining contract. Since Section 13 makes the whole intra-union appeal structure "unreasonable", Petitioner's contention is that either Section 13 must be declared void, or else the whole intra-union structure of Article 33 must be declared void. Petitioner's complaint seeks only to void Section 13, rather than the whole intra-union structure.

The Courts below held that no issue of material fact was raised by Petitioner's allegation that intra-union exhaustion was inherently futile in respect to any claim against the bargaining contract itself. However, the Courts below did not reason their way to this conclusion by actually comparing the language of LMRDA Secs. 411(a)(4) and 415 with the language of constitutional Article 33, Section 13 which requires exhaustion in all cases, and with the language of Article 19, Section 1 and Article 33, Section 12, which preclude any intra-union remedy for a claim against the bargaining contract.

Rather than compare the specific evidence in this case with the specific language of the LMRDA statutes, the Courts below simply held that all UAW intra-union provisions had been approved for all time by *Newgent* v. *Modine Mfg. Co.*, 495 F. 2d 919, 927 (7th Cir., 1974). According to the Courts below, any attack upon any UAW intra-union provision in the post-*Newgent* world is necessarily "frivolous." (See A3 of District Court opinion, adopted in toto by Court of Appeals.)

The Courts below were unmoved by Petitioner's observation that the court in *Newgent* was not faced with this particular type of claim against the UAW constitution, and therefore

could not have, and did not rule on it. Solely on the basis of *Newgent*, the Courts below therefore held that Petitioner's claims against Article 33, Section 13 raised no issue of material fact as to the futility of intra-union exhaustion of any claim against the bargaining contract (see A2, A4 of District Court opinion, adopted in toto by Court of Appeals).

Petitioner therefore asks the Supreme Court to review the substantive merits of this claim in respect to the specific language of the LMRDA statutes, and in light of the traditional standards for judging the sufficiency of pleadings.

(3) Inherent Futility of Exhaustion of Intra-Union Procedures Whenever a Claim Is Made Against the Employer and the Unions Jointly.

Article 33, Section 13[2] on its face requires a union member to resort to and exhaust intra-union procedures before filing suit against the union in respect to any and all claims he may have which involve the union.

Petitioner's complaint asserts that no adequate remedy is available through intra-union procedures on a claim against the employer and union jointly. One example of a joint claim for which no adequate intra-union remedy is available is Petitioner's claim against the employer and local union under LMRA alleging the "typical triad" of claims for wrongful acts in the administration of a bargaining contract, to wit: employer breach, local union unfair representation of a grievance, and conspiracy by employer and local union in the above.

As this case comes before the Supreme Court, it is conceded that Petitioner's "typical triad" claims raise issues of material fact. The Court of Appeals has therefore allowed Petitioner to proceed with his civil suit against the employer upon said claims. The Court of Appeals has forbidden Petitioner to proceed with his civil suit against the local union on these "typical

2. Article 33, Section 13, *supra*, pg. 24.

triad" claims solely because of Petitioner's failure to first exhaust intra-union procedures as required by constitutional Article 33, Section 13. In Question I of this Petition, the Petitioner asks the Supreme Court to reverse the Court of Appeals and allow a single civil action on the "typical triad" claims against the employer and local union. Otherwise, Petitioner must undertake the burden of pursuing his joint claims in the multiple forums of court and intra-union procedures. This is an undue burden, an impractical burden, and probably an impossible burden for Petitioner and all other employees. It is conceded by the Court of Appeals that no remedy against the employer is available through a resort to the UAW procedures.

If in response to Petitioner's Question I herein, the Supreme Court reaffirms its own established rule of the employee's right to a single civil action, Petitioner then submits that it follows automatically that constitutional Article 33, Section 13 is on its face fraudulently misleading. That is, it wrongfully requires an employee to undertake the undue burden of pursuing "typical triad" claims against his employer and local union in multiple forums.

Since Article 33, Section 13 is necessarily misleading on its face (if the Supreme Court supports Petitioner on the Question I issue of the right to a single civil action), Petitioner's complaint sought a declaratory judgment voiding the Article on the basis of LMRDA Sec. 411(b).

If the Supreme Court supports Petitioner on Question I, then Petitioner asks the Court to review the substantive merits of his claim that Article 33, Section 13 on its face is misleading on the employee's right to a single civil action. The sufficiency of the claim should, of course, be determined under the traditional standards for judging the sufficiency of pleadings. This appeal does not involve a review of a trial on the merits.

F. Alleged Violation of LMRDA Sec. 415 Duty to Inform Members of the Provisions of the LMRDA Bill of Rights.

LMRDA Sec. 415 states:

> "Section 415. INFORMATION TO MEMBERS OF PROVISIONS OF CHAPTER. Every labor organization shall inform its members concerning the provisions of this Chapter."

It is, of course, undisputed that Sec. 415 is referring to the provisions of the LMRDA Bill of Rights, 29 U. S. C. Secs. 411-415.

It is undisputed that Petitioner swore under oath in his verified complaint that the international and local unions failed to inform him of the provisions of the LMRDA Bill of Rights, and in particular failed to inform him of the provisions of Sec. 411 (a)(4) to the effect that the unions could not limit his right to sue the unions or any other party, could not require him to exhaust unreasonable intra-union procedures, and could not require him to exhaust any union procedures for a period exceeding four months; that in particular the unions also failed to inform him of the provisions of Sec. 411(b) to the effect that any intra-union procedural provision inconsistent with the standards of Sec. 411(a)(4) was void; that in particular the unions also failed to inform him of the provisions of Sec. 412 to the effect that any union member whose rights under Secs. 411(a)(4) and 411(b) were infringed by the union could bring a civil action in federal court.

It is also undisputed that in the Courts below the Respondents did not file any counter-affidavit or present other evidence showing that the unions had, in fact, informed Petitioner of the provisions of the LMRDA Bill of Rights. Quite to the contrary, Section 38[3] of the bargaining contract negotiated by the unions and presented to the union members by the union as a statement of the members' legal rights absolutely prohibits all union mem-

3. Section 38, *supra*, pg. 18.

ber lawsuits against the employer for breach of the bargaining contract. Article 33, Section 13[4] of the union constitution on its face requires exhaustion of union procedures for an unlimited period of time, with no notice of the four-month maximum period prescribed by LMRDA Sec. 411(a)(4).

Although LMRDA Sec. 415 requires a union to inform its members that by reason of Sec. 411(a)(4) the members need not exhaust unreasonable union procedures, Article 33, Section 13 on its face requires union members to exhaust procedures inherently unreasonable in respect to handling any claim against the union constitution itself, or against the bargaining contract, or against the employer and union jointly (see Part E above).

In the Courts below, Petitioner asserted on the basis of the above evidence (his affidavit and the overt language of aforesaid documents) that his complaint had raised an issue of material fact concerning the unions' compliance with their Sec. 415 duty to inform him of the provisions of the LMRDA Bill of Rights.

The Courts below held that no issue of material fact was raised by the Sec. 415 claim, and granted summary judgment on grounds that Petitioner had failed to state a claim. However, the Courts below did not reason their way to this conclusion by comparing the specific language of the LMRDA statutes with the specific language and effect of Petitioner's affidavit, or of Section 38 and Article 33, Section 13. Rather than compare the specific evidence in this case with the specific language of the statutes, the Courts below simply held that all UAW intra-union provisions had been approved for all time by *Newgent* v. *Modine Mfg. Co.*, 495 F. 2d 919, 929 (7th Cir., 1974). The Courts below held that *Newgent* had cancelled the unions' Sec. 415 duty to inform its members of their rights, and instead had henceforth required members to inform themselves of their rights (see A3 of District Court opinion, adopted in toto by Court of Appeals). The Courts below therefore held that Petitioner's claim that the unions had violated their Sec. 415

4. Article 33, Section 13, *supra*, pg. 24.

duty to inform raised no issue of material fact (see A2, A4 of District Court opinion, adopted in toto by Court of Appeals).

The Courts below were unmoved by Petitioner's argument that the court in *Newgent* was not faced with any Sec. 415 claim, and clearly did not hold that the UAW complied with LMRDA Sec. 415.

Therefore, Petitioner herein asks the Supreme Court to review the substantive merits of his claim under Sec. 415 in light of the traditional standards for judging the sufficiency of pleadings.

G. Alleged Conspiracy by Employer, International and Local Unions in Above Wrongful Acts in the Very Negotiation and Perpetuation of the Bargaining Contract and the Union Constitution.

Petitioner's complaint alleged that the employer and the international and local unions had conspired together by means of Section 38 of the bargaining contract and Article 33, Section 13 of the union constitution for the purpose of illegally prohibiting employee lawsuits against themselves.

The Courts below held that Petitioner had raised no issue of material fact on this particular conspiracy claim, and therefore granted summary judgment for failure to state a claim (see pages A3, A4 of District Court opinion, adopted in toto by Court of Appeals).

Petitioner herein asks the Supreme Court to review the substantive merits of his claim of a conspiracy in regard to negotiating and perpetuating Section 38 and Article 33, Section 13. Petitioner submits that if the Supreme Court rules in his favor on any of the claims directly against those provisions, then it would automatically follow that the conspiracy claim in respect to them was also sufficiently pleaded.

That is, it is undisputed that Section 38 of the bargaining contract was negotiated and perpetuated by all Respondents.

Therefore, all Respondents should be held accountable if it is determined that Section 38 fraudulently misrepresents an employee's established legal right to sue his employer for breach of the bargaining contract.

In respect to union constitutional Article 33, Section 13, although the employer is not a co-author, it is undisputed that the employer has joined in a united front with the unions in this lawsuit and in other officially reported lawsuits in asserting that Article 33, Section 13, prohibits all employee lawsuits against the employer as well as against the unions prior to complete exhaustion of intra-union procedures on all claims. Therefore, if it is determined that Article 33, Section 13 misrepresents an employee's right to sue prior to intra-union exhaustion, Petitioner submits that the employer has wrongfully benefited and should be held jointly accountable with the unions.

REASONS FOR GRANTING THE WRIT.

Petitioner would like to emphasize that this appeal involves independent causes of action that were pleaded in respect to wrongful acts in the administration of a bargaining contract, in the negotiation of bargaining contract Section 38, and in the imposition of union constitutional Article 33, Section 13. The following "Reasons for Granting the Writ" therefore require independent determination, since they do not of necessity all stand or fall together. Petitioner, of course, feels that all the "Reasons" are sufficient.

Petitioner would also like the Supreme Court to understand that the Courts below in the appended opinions have described federal statutes and Petitioner's pleadings in a very inaccurate manner. Petitioner did not plead a breach of the duty of fair representation under LMRDA Secs. 411 and 415, but rather under LMRA, as is proper. Under Secs. 411 and 415, he pleaded wrongful limitation on the right to sue and failure to inform of the right to sue. The Court of Appeals declined to correct this inaccuracy, although requested to do so.

1. A Conflict with the Decisions of the Supreme Court and of Other Circuits Is Created by the Decision of the Court Below Which Prevents Petitioner from Prosecuting Joint Claims Against His Employer and Union in a Single Civil Action.

Petitioner submits that Question I presents the type of conflict that requires Supreme Court intervention. The conflict in this instance is created by the decision of the Court of Appeals upon rehearing that requires the Petitioner to pursue in multiple forums the concededly sufficient joint claims against his employer and local union for wrongful acts in the administration of the bargaining contract. This multiple forum requirement is in sharp conflict with the established federal rule that an employee shall be allowed to join both defendants in a single civil action whenever he cannot join them both in a single intra-union proceeding.

The concededly valid joint claims against employer and local union are the "typical triad" of claims under LMRA for wrongful acts in the administration of a bargaining contract: (1) employer breach of employee's contract rights, (2) local union unfair representation in handling the grievance over said breach, and (3) conspiracy by the employer and local union in the above acts (See Part C, "Statement of the Case").

Even if it is assumed that the UAW intra-union procedures are all legal on their face and could provide a remedy against the local union alone in respect to the above claims, Petitioner herein submits that under the rule established by the Supreme Court and the other Circuits, an employee in this situation has a clear right to join both the employer and the local union in a single civil action: Supreme Court: *Glover* v. *St. Louis & S. F. Ry. Co.*, 393 U. S. 324, 329-331 (1969); Sixth Circuit; *Marlowe* v. *Fisher Body*, 489 F. 2d 1057, 1065, 1066 (6th Cir. 1973); *Day* v. *United Automobile, Aero & Agr. Imp. Wkrs., Local 36*, 466 F. 2d 83, 96 (6th Cir., 1972); Eighth Circuit: *Petersen* v. *Rath Packing Company*, 461 F. 2d 312, 315 (9th Cir., 1972);

Ninth Circuit: *Retana* v. *Apartment, Motel, Hotel & El. Op. U.*, 453 F. 2d 1018, 1027, 1028 (9th Cir., 1972).

In each of the above cases, an employee brought a civil action against his employer and union jointly. In each case the defendants moved for dismissal or summary judgment on the pleadings on the grounds that the employee had failed to exhaust intra-union procedures. At the final stage of appeal, the courts in each of the above cases held that the employee's failure to exhaust union procedures did not preclude civil jurisdiction, and that the employee had a right to proceed against both employer and union in a single civil action, since union procedures could not provide a remedy against both.

The conflict with these decisions created by the decision of the Court below is particularly sharp in regard to *Marlowe* v. *Fisher Body* and *Day* v. *United Auto Workers*, since the UAW along with an auto company was a defendant in both cases. In those cases, the UAW intra-union procedures available were identical to the procedures available in this case. In rejecting the UAW's motion for summary judgment based on the employee's failure to exhaust UAW procedures, the Sixth Circuit in *Marlowe* held:

> "If the conditions alleged by the plaintiff provide an exception to the requirement of exhaustion of the (bargaining) contractual remedies, they would seem to provide an even stronger argument for not requiring that he exhaust his internal remedies." 489 F. 2d at 1065.

It would be impossible to produce a more direct conflict between Circuit Court decisions on the question of an employee's right to join both the UAW and his auto company employer in a single civil action. The Supreme Court should resolve the conflict.

In upholding an employee's right to a single civil action in spite of his failure to exhaust union procedures, each of the above opinions relied on the Supreme Court's opinion in *Vaca* v. *Sipes*, 386 U. S. 171, 177-188 (1967) and in *Steele* v. *Louisville*

& N. R. Co., 323 U. S. 192 (1944). The particular issue of intra-union exhaustion was not before the Court in *Vaca* or *Steele*. However, the above cited cases that did face that issue considered *Vaca* and *Steele* to have established the general standards to be used in determining when an employee could be excused from exhausting private contractual remedies, be they imposed by bargaining contract or by union constitution.

For example, in *Glover* v. *St. Louis & S. F. Ry. Co.*, the Supreme Court denied the defendants' motions for summary judgment that were based on the employees' failure to exhaust intra-union procedures. As authority for this, the Supreme Court cited the general standards regarding futility of exhaustion which it had set out in *Steele*, and held:

> "And the reasons which prompted the Court to hold as it did about the inadequacy of a remedy before the Adjustment Board apply with equal force to any remedy administered by the union. . . .". 393 U. S. at 330.

In *Steele*, the aforementioned "reasons which prompted the Court to hold as it did" were as follows:

> ". . . that Board could not give the entire relief here sought." 323 U. S. at 205.

It is undisputed that the UAW procedures "could not give the entire relief here sought" because a remedy against the employer is not available through UAW procedures. For this reason, the Court of Appeals allowed Petitioner to proceed with his civil action against the employer. Therefore, if the *Glover* rationale is applied to this case, intra-union exhaustion cannot be a prerequisite to suing the union either, because it cannot provide a remedy against the employer.

In a similar vein, in upholding an employee's right to join both employer and union in a single civil action, the Supreme Court in *Vaca* v. *Sipes* explained that a single action was necessary in order to avoid imposing an undue multiple forum burden on the employee. Although there was no intra-union

exhaustion issue in *Vaca*, the defendants argued that the employee should be required to pursue his claims against the union before the NLRB. In rejecting this argument, the Court in *Vaca* first held that a civil action against the employer on the related breach of bargaining contract claims was necessary and proper in any event (386 U. S. at 179, 180). *Vaca* then noted that even in a civil action against the employer alone for breach of contract, the employee must simultaneously prove the unfair representation claim against the union (386 U. S. at 186, 187). In view of that requirement, the Court held:

> "What possible sense would there be in a rule which would permit a court that has litigated the fault of the employer and union to fashion a remedy only with respect to the employer? Under such a rule . . . the injured employee would be forced to go to two tribunals to repair a single injury. . . . Given the strong reasons for not preempting fair representation suits in general, and the fact that courts in many Sec. 301 suits must adjudicate whether the union has breached its duty, we conclude that the courts may also fashion remedies for such breach of duty." 386 U. S. at 187, 188.

A multiple forum burden of court and intra-union procedures was held to be equally absurd and unfair in *Glover* v. *St. Louis & S. F. Ry. Co.*, *Marlowe* v. *Fisher Body*, *Day* v. *United Auto Workers*, *Petersen* v. *Rath Packing Company*, and *Retana* v. *Apartment Workers Union* (*supra*). There also, in a civil action against the employer alone for breach of contract, the employee still has to prove the unfair representation charge against the union, and the court has to make a ruling on it. In an intra-union proceeding against the union alone for unfair representation, the employee still has to prove the breach of contract charge against the employer. All witnesses will have to be called twice. All documents will have to be produced twice. Any appeal would have to be taken twice. This situation is absurd and unfair, and the Supreme Court should not allow it here.

The Supreme Court reaffirmed an employee's right to a single civil action on joint claims against his employer and union in *NLRB* v. *Marine Workers Union*, 391 U. S. 418, 425 (1968). In that case the union also moved for summary judgment on the pleadings on the ground that the employee there had failed to exhaust union procedures. The union procedures there were essentially identical to the three-step UAW procedures (see footnote 4, 391 U. S. at 422). The union's motion was granted in the Court of Appeals. The Supreme Court reversed for the following reasons. Although the employer in that case had not been made a party, the Supreme Court noted that the employer "might also have been made a party" because the employee's original charge implicated the employer as well as the union (391 U. S. at 425). The Court noted that because of the employer's involvement, the employee's original charge raised a whole complex of public policy issues, and not merely internal union matters (391 U. S. at 424, 425). In view of that, the Supreme Court in *NLRB* v. *Marine Workers Union* held:

> "Those issues cannot be fully explored in an internal union proceeding. There cannot be any justification to make the public processes wait until the union member exhausts internal procedures plainly inadequate to deal with all phases of the complex problem concerning employer, union and employee member. If a member becomes exhausted instead of the remedies, the issues of public policy are never reached and the airing of the grievance never had." 391 U. S. at 425.

Petitioner's original charge definitely does name the employer as a party in a complaint that also raises a whole complex of public policy issues. It is not merely internal union affairs that are involved. Therefore, under the *Marine Workers Union* rule, Petitioner should be allowed to proceed against both the employer and union in a single civil action on the claims for wrongful acts in the administration of the bargaining contract.

The Supreme Court again reaffirmed an employee's right to a single civil action in *Hines* v. *Anchor Motor Freight, Inc.*,

424 U. S. 554, 567 (1976), although the intra-union exhaustion issue was not involved therein.

Neither the Respondents nor the Courts below have cited a single case that specifically ordered an employee to pursue joint claims against his employer and union in the multiple forums of court and intra-union procedures where the employee had presented the above argument for a single civil action. In the Courts below, the Respondents cited many cases in which a UAW member with a joint claim against his employer and the UAW was required to exhaust UAW procedures before filing suit against the union. Presumably, the Respondents will again cite those cases in answer to this Petition. However, if the Supreme Court will examine those cases closely, it will discover that none of the cases explicitly purport to controvert the single civil action rule. Many erstwhile plaintiffs simply failed to make the proper legal arguments, and suffered the consequences of a poorly pleaded case.

For the foregoing reasons, Petitioner submits that the Supreme Court should issue a writ of certiorari in respect to Question I. The decision of the Court below which requires Petitioner to pursue concededly valid joint claims against his employer and union in multiple forums is in serious conflict with the decisions of the Supreme Court and of other Circuits which establish a right to a single civil action in these circumstances.

2. A Conflict with the Decisions of the Supreme Court and of Other Circuits Is Created by the Decision of the Court Below Holding That No Issue of Material Fact Is Raised by Petitioner's Claim Against Section 38 of the Bargaining Contract.

Petitioner submits that Questions II and III present the type of conflict that requires Supreme Court intervention. In this instance, the conflict is created by the decision of the Court below holding that no issue of material fact is raised by Peti-

tioner's claim that Section 38 of the bargaining contract, on its face, fraudulently misrepresents an employee's established legal right to sue his employer for breach of contract in every instance where union unfair representation has precluded any other remedy against the employer through further resort to bargaining contract or intra-union procedures.

Under the Chrysler-UAW contract, it is conceded that a grievance wrongfully settled by the union cannot be reinstated by the union even if the employee were successful in an intra-union appeal of the local union's wrongful decision to settle the grievance. This result follows from Section 30 of the bargaining contract, which provides (so far as material):

> "Section 30. TIME OF APPEALS. (a) Hereafter, a grievance not appealed from an answer at one step of the grievance procedure to the next step of the grievance procedure within five (5) working days after such answer, except that on appeal to the Appeal Board the time limit shall be thirty (30) days, shall be considered settled on the basis of the last answer and not subject to further review. . . ."

Since Petitioner's grievance could not be reinstated in accordance with the terms of the contract, the Court of Appeals in its decision upon rehearing held that Petitioner could proceed with his civil action against the employer for breach of contract.

Petitioner's complaint demanded that Section 38 of the contract be declared void because on its face its fraudulently misrepresents and prohibits the employee's established legal right to sue the employer where no other remedy is available because of the aforementioned provisions of Section 30. Petitioner submits that Section 38 cannot be considered legal merely because the Court below allowed this particular lawsuit in spite of the absolute prohibition of all employee lawsuits in Section 38. Section 38 of the bargaining contract provides in its second and third paragraphs:

> "Section 38. LAWSUITS. . . . only the Union shall have the right to assert and press against the Corporation in any

judicial or adjudicatory proceeding any claim or action asserting a violation of this Agreement.

No employee or former employee shall have any right of action under this Agreement on the basis of or by reason of any claim that the Union or any Union officer has acted or failed to act relative to the presentation, prosecution or settlement of any grievance or other matter as to which the Union or any Union representative has authority or discretion to act or not act under the terms of this Agreement."

Obviously, Section 38 states that no employee can sue the employer for breach of contract even if the union has breached its statutory duty of fair representation in handling the employee's grievance over said breach of contract. This prohibition on lawsuits pertains even though aforementioned Section 30 precludes any remedy against the employer through further resort to bargaining contract or intra-union procedures.

It is undisputed that the union has the sole authority and discretion to act or not act to invoke the three higher steps of the four-step bargaining contract grievance procedure, and to settle grievances without the employee's consent. Therefore, it is clear that Section 38, on its face, prohibits employee lawsuits even where no other remedy is available against the employer.

As the issue of the sufficiency of the pleadings attacking Section 38 came before the Courts below, and as it comes before the Supreme Court, the question is whether Section 38 could ever be held to be misleading and injurious to a typical "reasonable" employee who reads it. That is, when an employee feels that his grievance has been wrongfully settled by the union, and when he discovers that no remedy against his employer is available through further resort to private procedures, does Section 38 wrongfully discourage him from bringing the necessary civil action against the employer? Does it misrepresent his established legal right to sue? Does it have a "chilling effect"?

It is undisputed that Petitioner had no education beyond the high school level at the time of the original injury, a situation

in common with most UAW members. Such employees are not lawyers or judges who are conversant with the esoterics of the *Vaca* v. *Sipes, et seq.* doctrine, under which an employee can sue his employer in spite of provisions like Section 38. They have to take Section 38 for what it says or appears to say on its face. On its face, Section 38 tells the employee:

> "LAWSUITS. . . . only the Union shall have the right to assert and press against the Corporation in any judicial or adjudicatory proceeding any claim or action asserting a violation of this Agreement.
>
> No employee or former employee shall have any right of action under this agreement. . . ."

Petitioner's complaint alleged that this language of Section 38, on its face, constitutes a violation of LMRDA Sec. 411(a)(4), which provides (so far as material):

> "Sec. 411(a)(4). PROTECTION OF THE RIGHT TO SUE. No labor organization shall limit the right of any member thereof to institute an action in any court . . . irrespective of whether or not the labor organization or its officers are named as defendants . . . "

The Courts below held that no issue of material fact was raised by Petitioner's claim that Section 38 on its face limited his right to sue the employer by explicitly prohibiting all employee lawsuits. Petitioner herein asks the Supreme Court: If an absolute contractual prohibition on all employee lawsuits against the employer is not a "limitation" under LMRDA Sec. 411(a)(4), then what acts by the Respondents could ever suffice to show a "limitation"? Must the employee be able to show that the Respondents kept him away from the courthouse door with gunfire or goon squads? Short of physical violence, the absolute prohibition on employee lawsuits in Section 38 is the most extreme act available to Respondents who would wrongfully "limit" a member's right to sue.

Petitioner's complaint also alleged that the above language of Section 38 on its face constitutes a violation of the unions' LMRDA Sec. 415 duty to inform him of the provisions of LMRDA Sec. 411(a)(4) to the effect that the unions cannot limit his right to sue the employer. The Courts below held that this claim raised no issue of material fact. Petitioner herein asks the Supreme Court: If a contract provision co-authored by the unions which prohibits all employee lawsuits is not a violation of the unions' duty to inform him that it cannot limit his right to sue the employer, then what acts by the unions could ever suffice to establish the unions' failure to inform? Must the employee attach to his complaint an affidavit signed by the unions stating: "The union hereby admits that it violated its LMRDA Sec. 415 duty to inform its members that it could not limit their right to sue the employer"?

Petitioner's complaint also alleged that the above language of Section 38 on its face misrepresented his established legal right to sue to such a degree that the unions violated their LMRA duty of fair representation in the very act of negotiating and perpetuating Section 38. The Courts below held that this claim raised no issue of material fact. Petitioner herein submits that this holding, along with all the other referred to above, is in conflict with applicable decisions of the Supreme Court and of other Circuits.

To begin with, it is a matter of established law that a union may be held liable for violating its LMRA and LMRDA duties in the very negotiation of a bargaining contract. In *Vaca* v. *Sipes,* the Supreme Court stated:

> ". . . fair representation duty suits often require review of the substantive positions taken and policies pursued by a union in its negotiation of a collective bargaining agreement. . . ." 386 U. S. at 181.

Vaca itself did not involve any claim for wrongful acts in the negotiation of a bargaining contract. However, *Vaca* noted that the duty of fair representation was first developed in a series

of cases under the Railway Labor Act, including *Steele* v. *Louisville & Nashville R. Co.* (386 U. S. at 177). In *Steele*, the complaint did allege unfair representation in the negotiation of a bargaining contract, and it sought an injunction voiding the particular provision (323 U. S. at 197). Upon appeal, the Supreme Court held that a sufficient claim had been stated for unfair representation in the negotiation of the contract, and that an injunction voiding an illegal provision was a proper remedy (323 U. S. at 203). The Court held that the employer was not entitled to take the benefit of a contract provision which the union was prohibited from making by reason of its duty of fair representation (323 U. S. at 203, 204). In *Steele*, the offending contract provisions discriminated on the basis of race. In this case, Section 38 prohibits all employee lawsuits against the employer for breach of contract, although such suits are a matter of legal right. If not on all fours, *Steele* is pertinent in that it establishes an employee's legal right to a civil injunction voiding any bargaining contract provision agreed to by a union in violation of its duty of fair representation.

The Ninth Circuit has also approved a civil action on an employee's complaint alleging unfair representation in the negotiation of a bargaining contract, where the complaint sought an injunction voiding certain contract provisions. In *Beriault* v. *Super Cargoes & Checkers of I. L. & W. U.*, 501 F. 2d 258 (9th Cir., 1974), the Ninth Circuit reversed the District Court's dismissal of the complaint and held:

> "The claims relating to breach of the duty of fair representation in *negotiating* the collective bargaining agreement, however, do state a valid cause of action. The failure to exhaust grievance procedures is of no consequence as to these claims because plaintiffs seek modification of the contract, a remedy not available through the grievance procedure." 501 F. 2d at 266.

Although the plaintiffs in *Beriault* did not attack a contract provision on the grounds that it misrepresented their right to

sue, *Beriault* is pertinent to this case in that it approves a civil action against the contract itself. *Beriault* is also pertinent in holding that the traditional standards for judging the sufficiency of pleadings are to be used by a court in evaluating claims against a contract. In respect to the claim against the contract, *Beriault* held:

> "We intimate no opinion, of course, as to whether plaintiffs should succeed on this cause of action. We merely note that it does not appear 'beyond doubt that plaintiff(s) can prove no set of facts in support of (their) claim which would entitle (them) to relief.' Conley v. Gibson, 355 U.S. 41, 45-46 . . . Retana v. Apartment Workers Local 4, supra, 453 F.2d at 1022." (501 F. 2d 264, fn. 4.)

In accord with this statement of pleading requirements is *Czosek* v. *O'Mara*, 397 U. S. 25, 27 (1970). Petitioner herein submits that the decision of the Court below holding that Petitioner's claim against Section 38 raised no issue of material fact is in conflict with the above Supreme Court and Circuit Court opinions which mandate a liberal construction of the pleadings in favor of the plaintiff. To reiterate the language of Section 38, it informs the non-lawyer employees:

> "LAWSUITS. . . . only the Union shall have the right to assert and press against the Corporation in any judicial or adjudicatory proceeding any claim or action asserting a violation of this Agreement.
>
> No employee or former employee shall have any right of action under this Agreement . . ."

Petitioner's complaint asserted that this language on its face fraudulently misrepresents an employee's right to sue, wrongfully "limits" his right to sue, and necessarily fails to "inform" him that the union cannot limit his right to sue, all in violation of the LMRA duty of fair representation, and LMRDA Secs. 411 (a)(4), 411(b) and 415, respectively.

Petitioner submits that it is self-evident from the language of Section 38 that the Court below in rejecting the claim against

Section 38 did not construe the pleadings liberally in favor of the plaintiff, and therefore is in conflict with the established federal rule. If an absolute prohibition on employee suits against the employer could never be held to constitute a "limitation" on the right to sue, what possible evidence ever could establish a wrongful limitation?

In the *United States* v. *Diebold, Inc.*, 369 U. S. 654 (1962), the Supreme Court held:

> "On summary judgment the inferences to be drawn from the underlying facts contained in such materials (affidavits, exhibits and depositions) must be viewed in the light most favorable to the party opposing the motion." 369 U. S. at 655.

Petitioner submits that the inferences to be drawn from the language of Section 38, if viewed in the light most favorable to Petitioner, are that Section 38 on its face appears to prohibit all employee lawsuits against the employer for breach of contract, and it cannot be stated beyond doubt that no jury could ever find that this misrepresented the right to sue, limited it, and failed to inform of the right to sue, in violation of the LMRA duty of fair representation and in violation of LMRDA Secs. 411(a)(4) and 415, respectively.

If the rejection of the claim against Section 38 by the Courts below is not technically in "conflict" with the general federal rules on judging the sufficiency of pleadings, the legality of Section 38 certainly involves an important question of federal law that should be decided by the Supreme Court. How far can employers and unions go in misrepresenting an employee's legal right to sue them?

The Chrysler-UAW bargaining contract covers several hundred thousand employees all over the United States. If Section 38 misrepresents their legal rights, it should be declared void. It is certainly possible for the Respondents to draft a bargaining contract provision which requires resort to private procedures in the first instance in accord with national labor policy, but

which does not at the same time fraudulently misrepresent the right to sue in violation of national labor policy.

Therefore, in Questions II and III, Petitioner asks that a writ of certiorari issue to review the summary judgment on the pleadings granted to the Respondents on the claims against Section 38 of the bargaining contract.

3. A Conflict with the Decisions of the Supreme Court and of Other Circuits Is Created by the Decision of the Court Below Holding That No Issue of Material Fact Is Raised by Petitioner's Claim Against Article 33, Section 13 of the Union Constitution.

Union constitutional Article 33, Section 13 reads as follows:

> "Section 13. It shall be the duty of any member or subordinate body who feels aggrieved by any action, decision, or penalty imposed upon him or it, to exhaust his or its remedy and all appeals therefrom under the laws of this International Union prior to appealing to a civil court or governmental agency for redress."

Petitioner alleged that this language on its face violates LMRDA Sec. 411(a)(4) in three ways: (1) by requiring exhaustion of union procedures inherently unreasonable, futile and inadequate in respect to any member claim against the union constitution, the bargaining contract, or the employer and union jointly; (2) by requiring exhaustion of union procedures for an unlimited period exceeding four months; and (3) by limiting Petitioner's right to sue the employer and the union prior to a resort to union procedures inherently futile and inadequate in respect to any of the above type of claims (see Part E, Statement of Facts).

Petitioner sought to have Section 13 declared void under LMRDA Sec. 411(b) on the grounds that it was "inconsistent" with the standards set out in Sec. 411(a)(4).

Petitioner also alleged that the language of Section 13 necessarily constituted a violation of LMRDA Sec. 415. The Article

on its face prohibits all lawsuits prior to unlimited exhaustion. In presenting Section 13 to the union members as a statement of their legal rights, the unions were necessarily failing to inform the members of the provisions of LMRDA Sec. 411 (a)(4) to the effect that the union cannot require exhaustion for a period exceeding four months, that the union cannot require exhaustion of union procedures inherently futile in respect to many types of claims, and that the union cannot limit a member's right to sue (see Parts E and F, Statement of Facts).

Petitioner also alleged that the unions violated their LMRA duty of fair representation in the very act of imposing and perpetuating Section 13, since on its face it fraudulently misrepresents a member's established legal right to sue in many cases without first exhausting union procedures (see Part E, Statement of Facts).

The Courts below held that no issue of material fact was raised by any of these claims against Section 13 under LMRA and LMRDA. However, the Courts below did not reason their way to this conclusion by actually comparing the language and effect of Section 13 with the specific language and effect of LMRDA Secs. 411(a)(4), 411(b) and 415. Rather than compare the specific evidence in this case with the specific statutory language, the Courts below held that carte blanche legal approval had been conferred on each and every UAW intra-union provision for all time in respect to all possible legal attacks by *Newgent* v. *Modine Mfg. Co.*, 495 F. 2d 919, 927 (7th Cir., 1974), and by *Reid* v. *Auto Workers, Local 1093*, 479 F. 2d 517 (10th Cir., 1973). The Courts below therefore held that in the post-*Newgent* world, any attack upon the face of any UAW intra-union appeal provision for any alleged reason under LMRDA was necessarily "frivolous." Therefore, the Courts felt it was unnecessary to make a detailed analysis of Section 13 in light of the specific language of the LMRDA statutes (see A3 of District Court opinion).

Petitioner submits to the Supreme Court, as he argued in the Courts below, that the lower Courts' analysis of *Newgent*

and *Reid* is not only illogical and unwarranted—it is unworthy of any federal court. With all due respect to the Courts below, their case analysis of *Newgent* and *Reid* is a piece of ridiculous nonsense. The courts in *Newgent* and *Reid* were not confronted with any of the specific claims presented in this case. Therefore, they could not and did not decide whether Article 33, Section 13 complied with the specific prescriptions and proscriptions of the LMRDA statutes.

For example, neither case held that the unlimited exhaustion requirement of Section 13 was "consistent" with the four-month maximum period allowed by LMRDA Secs. 411(a)(4) and 411(b). Neither case held that Section 13 was consistent with the UAW's LMRDA Sec. 415 duty to inform its members of the four-month maximum exhaustion period allowed by statute.

Neither *Newgent* nor *Reid* held that UAW procedures were "reasonable" under Sec. 411(a)(4) in respect to their capacity for handling any claim against the UAW constitution, the bargaining contract, or against the employer and union jointly.

For these reasons, it is preposterous for the Courts below to conclude that *Newgent* and *Reid* gave carte blanche legal approval to all UAW intra-union provisions for all time in respect to all possible attacks. In the UAW constitution, more than twenty pages of fine print are devoted to matters concerning intra-union procedures. Articles 3, 7, 8, 12, 19, 30, 31, 32, 33 and other isolated provisions all have a direct bearing on questions of intra-union procedure, depending on the nature of the claim. Some Articles establish the sequential steps of the procedure, while others define and limit the powers and jurisdiction of the intra-union authorities at various steps. Even without reading over the many intra-union provisions in the UAW constitution, the Supreme Court or any other court should be able to see that no one or two cases, such as *Newgent* and *Reid*, would be in any position to give carte blanche legal approval to this welter of provisions. However, the Courts below reached

the ridiculous conclusion that *Newgent* and *Reid* had approved all UAW provisions for all time. Therefore, the Courts below declined to analyze Petitioner's statutory claims in terms of the specific statutory language. Instead, the claims were rejected out of hand solely on the basis of *Newgent* and *Reid*.

Petitioner submits that the decision of the Court below granting legal sanction to Article 33, Section 13 solely on the basis of *Newgent* and *Reid* is in conflict with the applicable decisions of the Supreme Court and of other Circuits.

For example, in *NLRB* v. *Marine Workers Union*, 391 U. S. 418 (1968), the Supreme Court held in respect to LMRDA Sec. 411(a)(4):

> "We conclude that unions were authorized to have hearing procedures for processing grievances of members, providing those procedures do not consume more than four months of time; but that a court or agency might consider whether a particular procedure was 'reasonable' and entertain the complaint even though those procedures had not been exhausted." 391 U. S. at 428.
>
> "In the present case a whole complex of public policy issues was raised by Halder's original charge. It implicated not only the union but the employer. . . . Those issues cannot be fully explored in an internal union proceeding. There cannot be any justification to make the public processes wait until the union member exhausts internal union procedures plainly inadequate to deal with all phases of a complex problem concerning employer, union and employee member. If the member becomes exhausted instead of the remedies, the issues of public policy are never reached and an airing of the grievance never had." 391 U. S. at 425.

Under the *Marine Workers* rule, the Courts below were required to consider whether the UAW procedures were "reasonable" in respect to the particular claims made by Petitioner. The complaint pleaded claims against the employer and union jointly, against the bargaining contract itself, and against the union constitution itself. Under the *Marine Workers* rule, the

Courts below should have concluded that UAW procedures were "plainly inadequate to deal with all phases of this complex problem concerning employer, union and employee." This is particularly true in respect to the joint claims against the employer and local union for wrongful acts in the administration of the bargaining contract, which even the Courts below conceded sufficient (see Part C, Statement of Facts).

If under the *Marine Workers* rule the requisite finding is made that UAW procedures are plainly inadequate and futile in respect to any claim against the employer and union jointly, or against the bargaining contract (see Part D, Statement of Facts), or against the union constitution itself (see Part E, Statement of Facts), it is readily apparent why Article 33, Section 13 on its face is necessarily in violation of LMRDA Secs. 411(a)(4), 411(b) and 415, and must be declared void.

That is, while the basic three-step structure of the UAW procedures may be "reasonable" in its capacity to handle some claims, Section 13 itself is "unreasonable" because it requires a member to use union procedures on all claims involving the union, even though the structure is inherently incapable of providing a remedy for many types of claims, such as those pleaded by the Petitioner. The futility of intra-union exhaustion of Petitioner's claims isn't merely a matter of conjecture (again, see Parts D and E, Statement of Facts). Therefore, Section 13 on its face wrongfully limits the right to sue, wrongfully requires the exhaustion of union procedures inherently unreasonable for many claims, and requires exhaustion for an unlimited period of time in excess of four months.

Under LMRDA Sec. 411(a)(4), a union may not under any circumstances require exhaustion for a period exceeding four months: *NLRB* v. *Marine Workers Union*, 391 U. S. at 426, 428; *Semancik* v. *United Mine Workers of Am.*, 466 F. 2d 144, 150 (3rd Cir., 1972).

For the foregoing reasons, Petitioner submits that the decision of the Court below rejecting his claim against Article 33,

Section 13 solely on the basis of *Newgent* and *Reid* is in sharp conflict with the above decisions of the Supreme Court and other Circuits which require the application of specific statutory standards in determining the legality of particular intra-union provisions.

Petitioner also submits that the decision of the Courts below on his claims against Article 33, Section 13 is in conflict with Supreme Court opinions which mandate a liberal construction of the pleadings in favor of the plaintiff. See: *Conley* v. *Gibson*, 355 U. S. 41, 45-46 (1957); *Czosek* v. *O'Mara*, 397 U. S. 25, 27 (1970); *United States* v. *Diebold, Inc.*, 369 U. S. 654, 655 (1962). That is, it cannot be said beyond doubt that Petitioner could never prove that Article 33, Section 13 misrepresented or limited his legal right to sue the unions and the employer on many types of claims without first exhausting union procedures.

Therefore, in Questions IV and V, Petitioner seeks a writ of certiorari to review the summary judgment on the pleadings granted to the Respondents on the claims against Article 33, Section 13 of the union constitution.

CONCLUSION.

A Writ of Certiorari should issue to review the judgment and opinion of the Court of Appeals in this case.

Respectfully submitted,

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APPENDIX A.

UNITED STATES DISTRICT COURT
Northern District of Illinois
Western Division

JOEL D. ENDER, *Plaintiff,* *vs.* CHRYSLER CORPORATION, UNITED AUTO WORKERS LOCAL 1268, INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, *Defendants.*	73 C 23 W. D.

MEMORANDUM OPINION

JOEL M. FLAUM, District Judge:

This action is brought by plaintiff alleging: (1) unfair labor practices by defendant Chrysler Corporation in wrongfully discharging him and refusing to grant plaintiff back pay after reinstatement all in violation of the Labor-Management Relations Act § 301, 29 U. S. C. § 185, *as amended:* and (2) breach by defendants United Auto Workers Local 1268 and the International Union of their duty of fair representation in failing to press his grievance for back pay all in violation of the Labor-Management Reporting and Disclosure Act of 1959, 29 U. S. C. §§ 411, 415. Plaintiff seeks over $500,000 in compensatory and punitive damages, $400 of which represents the back pay he was seeking at the time he presented his grievance to his union and employer.

Defendants have moved for dismissal of plaintiff's complaint, as well as for summary judgment, on the ground that plaintiff failed to exhaust intra-union remedies available to him at the time plaintiff presented his grievance and that this failure precludes this action against plaintiff's employer and union. Plaintiff admits his failure to exhaust but argues that there exists genuine issues of fact as to whether or not in this case exhaustion is required. In the opinion of this court, no such issue of material fact exists and summary judgment is in order.

The law in this circuit is clear that, "Where . . . there is no questions as to the adequacy and mandatory nature of intra-union remedies . . . an exhaustion of the remedies is an indispensable prerequisite to the institutions of a civil action against a union." *Newgent* v. *Modine Mfgr. Co.*, 495 F. 2d 919, 927 (7th Cir. 1974). Moreover, as the Seventh Circuit pointed out, in a suit against an employer for breach of the collective bargaining agreement the employer can also raise as a defense the employee's failure to exhaust intra-union remedies when the employee is required to prove breach of the duty of fair representation by the union *before* he can challenge the employer's failure to properly consider his grievance. *Orphan* v. *Furnco Constr. Corp.*, 466 F. 2d 795, 800-01 (7th Cir. 1972). Since in the case at bar plaintiff admits in his pleading that only the union can process his grievance to the employer pursuant to the collective bargaining agreement, under the Supreme Court's ruling in *Vaca* v. *Sipes*, 386 U. S. 191 (1967), such a showing of unfair representation is required prior to establishing a breach of contract by the employer. Therefore, a demonstration of exhaustion of intra-union remedies is required by plaintiff in this case in order to state a claim against either his union or his employer.

As stated previously, plaintiff admits that he has failed to follow the intra-union remedies made available to him under the International Union's Constitution and By-Laws. However, plaintiff has made numerous arguments as to why exhaustion in

this case is not required. None of these arguments persuades the court that exhaustion of intra-union remedies was not required.

First, plaintiff challenges the United Auto Workers, International Union's intra-union remedies on their face as being in violation of 29 U. S. C. §§ 411 and 415. This facial attack is frivolous in light of the Seventh Circuit's recent commendation of these very same procedures. As the court stated:

> [i]t has been judicially recognized that the [UAW] remedies provide "an adequate, fair, and reasonable procedure." *Reid* v. *Auto Works, Local 1093,* 80 L. R. R. M. 2886, 2892 (D. Okla. 1972), aff'd, 479 F. 2d 517 (10th Cir. 1973).

Newgent v. *Modine Mfgr. Co.,* 495 F. 2d 919, 927 (7th Cir. 1974).

Second, plaintiff argues that *as applied,* the intra-union remedies are unfair and inadequate. Most of plaintiff's arguments need little comment. As to plaintiff's contention that the union's failure to inform him of his appeal rights excuses the exhaustion requirement, the court in *Newgent* stated:

> By becombing a member of the Union Nugent was contractually obligated to exhaust union remedies before resorting to a court action. . . . Necessarily implied in this obligation is the duty to become aware of the nature and availability of union remedies. Newgent was not "justified in remaining in ignorance of the provisions governing his own union. . . ."

495 F. 2d at 927-28. Furthermore, plaintiff's contention that "union" intransigence made compliance with intra-union remedies futile is without merit. Plaintiff alleges that on nine separate occasions he requested that his *local* take action to settle his grievance, and that he was told there was nothing that could be done. Again, as pointed out in *Newgent,* such allegations of a *local's* intransigence is insufficient to excuse failure to exhaust "union" remedies. *Id.* at 928. The plaintiff, however, attempts to show "union" intransigence by alleging that the International

was "conspiring" with Chrysler to prevent the resolution of plaintiff's grievance. This allegation is entirely conclusory and no facts are alleged or presented to this court to show that a conspiracy exists between the "International Union" and the other defendants in this cause. Therefore, no genuine issue of material facts exists as to union intransigence. *See Williams* v. *General Foods Corp.*, 492 F. 2d 399, 405 (1974).

The only other argument raised by plaintiff which needs discussion is plaintiff's contention that it would have been futile for plaintiff to exhaust the intra-union remedies since the International Union could not have reinstituted plaintiff's grievance with Chrysler and the International Union could not have granted him full relief. Plaintiff admits, however, that the intra-union remedies did allow for back pay as well as other compensatory damages and that the union did in fact get him reinstated. Plaintiff's argument, however, is promised on the fact that *punitive* damages are being sought and the union is unable to provide them. But, even if this is true, plaintiff's argument is unpersuasive. At the time that plaintiff had a grievance against Chrysler and sought union assistance, plaintiff only sought $400 in back pay after he had been reinstated. There is no question that the union could have granted plaintiff the relief he sought at the time of his grievance. Therefore, it is clear that the union could have given plaintiff full relief. To hold otherwise would mean that exhaustion would never be required if *ex post* an allegation of punitive damages is made. This simply is not, and indeed should not, be the law.

Thus, as there is no genuine issue of material fact, defendants' motions for summary judgment are granted.

It is so ordered.

/s/ JOEL M. FLAUM
United States District Judge

Dated: September 27, 1976

APPENDIX B.

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604

Argued June 1, 1977

Before

Hon. LUTHER M. SWYGERT, *Circuit Judge*
Hon. WILLIAM J. BAUER, *Circuit Judge*
Hon. ROBERT A. GRANT, *Senior District Judge**

JOEL D. ENDER,
Plaintiff-Appellant,

No. 76-2232 *vs.*

CHRYSLER CORPORATION, UNITED AUTO WORKERS LOCAL 1268, and INTERNATIONAL UNION, UNITED AUTOMOBILE AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois. Western Division.

No. 73 C 23

Joel M. Flaum, Judge.

ORDER

After reading the briefs and hearing oral argument in this case, we are of the opinion that the district court was correct in granting the defendants' motions for summary judgment and we adopt its memorandum opinion.

The judgment of the district court is affirmed.

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* The Honorable Robert A. Grant, United States Senior District Judge for the Northern District of Indiana is sitting by designation.

APPENDIX C.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

(Argued June 1, 1977)
October 11, 1977.

Before

Hon. LUTHER M. SWYGERT, *Circuit Judge*
Hon. WILLIAM J. BAUER, *Circuit Judge*
Hon. ROBERT A. GRANT, *Senior District Judge**

JOEL D. ENDER,
Plaintiff-Appellant,

No. 76-2232 *vs.*

CHRYSLER CORPORATION, UNITED AUTO WORKERS LOCAL 1268, and INTERNATIONAL UNION, UNITED AUTOMOBILE AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA,
Defendants-Appellees.

On Petition for Rehearing

ORDER

Subsequent to our decision in the case at bar, another panel of this Court held in *Harrison* v. *Chrysler Corporation*, No. 75-1970 (June 28, 1977), that an employer may raise an intra-union exhaustion defense only in the limited circumstances where in the employer establishes "that an intraunion appeal

* The Hon. Robert A. Grant, United States District Court for the Northern District of Indiana, is sitting by designation.

could result in reversal of the union's refusal to press the grievance and that the grievance could be reinstated in accordance with the provisions of the collective bargaining agreement." Because of the clear conflict between our deicsion in the case at bar and the decision reached in *Harrison*, and because we are now convinced that *Harrison* states the better view, we grant Ender's petition for rehearing, and vacate our prior order in the case at bar. In its place, we enter the following order:

"After reading the briefs and hearing oral argument in this case, we are of the opinion that the district court was correct in granting the defendant union's motion for summary judgment, and we adopt its memorandum opinion as our own on the issue of whether an employee alleging breach of the duty of fair representation is required to exhaust available intraunion remedies prior to bringing suit under the Labor-Management Reporting and Disclosure Act of 1959, 29 U. S. C. §§ 411, 415.

"With respect to the issue of whether an employee must exhaust intraunion remedies prior to bringing suit against an employer under Section 301 of the Labor-Management Relations Act, 29 U. S. C. § 185, however, we find this Court's decision in *Harrison* v. *Chrysler Corp.*, No. 75-1970 (June 28, 1977), controlling. In light of *Harrison*, which was decided subsequent to the district court's decision in the case at bar, we believe that the court's grant of summary judgment on behalf of defendant Chrysler Corporation must be reversed and the case remanded for further proceedings.

AFFIRMED IN PART, REVERSED IN PART, and REMANDED."

No. 76-2232
Ender v. Chrysler

SWYGERT, Circuit Judge, dissenting. I would adhere to our original order and affirm the district court in toto.

APPENDIX D.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

November 8, 1977

Hon THOMAS E. FAIRCHILD, *Chief Judge*
Hon. WALTER J. CUMMINGS, *Circuit Judge*
Hon. WILBUR F. PELL, JR., *Circuit Judge*
Hon. ROBERT A. SPRECHER, *Circuit Judge*
Hon. PHILIP W. TONE, *Circuit Judge*
Hon. WILLIAM J. BAUER, *Circuit Judge*
Hon. HARLINGTON WOOD, JR., *Circuit Judge*

JOEL D. ENDER,
Plaintiff-Appellant,

No. 76-2232 *vs.*

CHRYSLER CORPORATION, UNITED AUTO WORKERS LOCAL 1268, and INTERNATIONAL UNION, UNITED AUTOMOBILE AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois. Eastern Division.

No. 73-C-23

Joel M. Flaum, *Judge.*

On Petition for Rehearing

ORDER

The panel granted this petition for rehearing and issued its order deciding the merits of this appeal on Ocober 11, 1977.

Hon. LUTHER M. SWYGERT, *Circuit Judge**

* The Honorable Luther M. Swygert voted to grant the petition for rehearing *en banc.*

A judge in regular active service requested a vote and voted to rehear this appeal *en banc*. A majority of the judges in regular active service, however, voted not to rehear *en banc*.

Accordingly, IT IS ORDERED that this appeal not be reheard *en banc*.